(16)

No. 84-861

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board
Washington, D.C. 20570

11pp

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-861

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

---

1. The Shipping Group respondents[1] ignore the distinctions that are at the heart of this case. This case concerns only the application of the Rules on Containers to two specific practices, shortstopping and certain traditional warehousing activities. Those practices occur in connection only with FSL container loads — containers holding export cargo from only one shipper or import cargo destined for only one consignee. The Board upheld all other applications of the Rules on Containers that were at issue; that is, the Board upheld all applications of the Rules to LCL containers (containers holding export cargo from, or

---

[1]We use this term to refer to respondents ILA, the New York Shipping Association, Inc., and the Council of North Atlantic Shipping Associations. We refer to their brief as "Resp. Br."

import cargo destined to, more than one shipper or consignee).

But the Shipping Group presents this case as if it involved the question whether the Rules on Containers taken in their entirety have a lawful work preservation objective. The Shipping Group makes scant mention of the fact that the Board invalidated only the application of the Rules to shortstopping and the warehousing practices; and, tellingly, the Shipping Group makes virtually no mention of the distinction between FSL containers — which can move from shipper to consignee without being stuffed or stripped for any reason functionally related to longshore work — and LCL containers, to which, under aspects of the Board's ruling that are not now in issue, the Rules on Containers can now lawfully be applied.[2]

The Board found that "the work in dispute is the *initial* loading and unloading of cargo into and out of containers within 50 miles of a port" (Pet. App. 57a; emphasis added).[3]

---

[2]The Shipping Group relies (*e.g.*, Resp. Br. 17) on the Board's finding that "the work of loading and unloading containers claimed by the Rules is functionally related to the traditional loading and unloading work of the longshoremen" (Pet. App. 58a-59a). But it is evident that the Board (and the ALJ, who made a similar finding (*id.* at 114a)) were referring to their conclusion that the Rules in general have a work preservation objective and did not intend to suggest that every application of the Rules was lawful — as, indeed, their invalidation of the application of the Rules to shortstopping and the traditional warehousing practices demonstrates. See page 7 note 5, *infra*. We note further that the Board made this finding only in connection with the work of freight consolidators, not shortstopping or warehousing.

[3]To define the work in dispute as "the stuffing and stripping of longshore employers' containers at the pier," as the Shipping Group does (Resp. Br. 16-17), is to ignore this Court's admonition in *ILA I* that "the Board's determination that the work of longshoremen has historically been the loading and unloading of ships should be only the beginning of the analysis. The next step is to look at how the contracting parties sought to preserve that work * * * in the face of a massive

The Board further found that the initial loading and unloading *of LCL containers* performed by consolidators and freight forwarders within 50 miles of the port was the functional equivalent of the pre-containerization work of longshoremen of loading and unloading cargo into and out of the hold of the ship; the ILA thus had "a lawful work preservation objective in claiming this work under the Rules" (Pet. App. 59a). However, the Board also found that, insofar as is relevant here, the only initial loading and unloading of *FSL containers* which occurs within 50 miles of a port is that performed by motor carrier employees in shortstopping such containers for the convenience of land transportation and warehouse employees in stripping and stuffing them in connection with specialized warehousing practices. Faithful to the terms of this Court's remand in *ILA I*,[4] the Board focused on whether such work was functionally related to traditional longshore work. After such examination, the Board reasonably concluded that this stripping and stuffing of FSL containers was not related to the traditional work patterns of longshoremen, but rather to that of motor carrier and warehouse employees, and that therefore the Rules, in their application to that work, had an unlawful "work acquisition" objective.[5]

---

technological change that largely eliminated the need for cargo handling at intermediate stages of the intermodal transportation of goods, and to evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members." 447 U.S. at 509 (footnote omitted).

[4]This Court in *ILA I* directed the Board to conduct "a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve" (447 U.S. at 507) that focuses on the "historical and functional relationship between the retained work and traditional longshore work" (*id.* at 510).

[5]The Shipping Group's contention (Resp. Br. 18) that the Rules are not " 'applied to shortstopping and traditional warehousing practices' " because the "Rules retain only the work of stuffing and stripping

Thus, as shown in our opening brief (at 6-8, 29-31), before containerization, cargo destined for a single consignee was unloaded in break-bulk from the ship by longshoremen and then placed onto a truck, which was driven a short distance to the carrier's inland terminal near the pier. There — even though the truck load was destined for a single consignee — employees of the motor carrier frequently shortstopped it; that is, they unloaded the cargo and reloaded it for a variety of reasons associated with the economics and safety of motor transportation. After containerization, cargo destined for a single consingee (a FSL container) is taken from the hold of the ship and attached directly to a chassis, thus eliminating the initial break-bulk handling by longshoremen at the pier. From that point on, the FSL container is treated in the same fashion as a truckload destined for a single consignee was treated before containerization. The container is driven to the motor carrier's pier area terminal, where it is shortstopped for the same reasons that pre-containerization truckloads were shortstopped. On these facts, the Board was warranted in finding that the work done at the pier by longshoremen in connection with cargo

---

containers at the pier" ignores the way in which the Rules operate with respect to FSL containers. Under the Rules, FSL containers are generally permitted to pass through the port area with no claim made by the longshoremen to any loading or unloading work in connection with them. It is only if they are shortstopped by motor carrier employees or stripped or stuffed by warehouse employees within 50 miles of the port that the Rules lay a claim to them, and it is that limited claim alone that is before this Court. (The Rules except FSL import containers where the cargo has been warehoused for at least 30 days; there is currently no similar exception for FSL export containers (Pet. App. 103a-104a).) In short, the conduct that triggers the penalties imposed by the Rules is the performance of stripping and stuffing work by motor carrier and warehouse employees. Accordingly, the Board properly viewed the shortstopping of FSL containers and the stripping and stuffing of such containers in connection with specialized warehousing practices as the work in dispute.

destined for a single consignee has been essentially eliminated due to containerization; and that shortstopping (*of FSL containers*) was not functionally related to traditional longshore work, but rather was related to the traditional work patterns of motor carrier employees.[6] Similarly, as shown in our opening brief (at 8-9, 31-32), the Board was warranted in finding that the stripping and stuffing of FSL containers by specialty warehouses in connection with the storage of goods for later release pursuant to the instructions of the consignee or shipper was not traditional longshore work, but rather was related to the traditional work patterns of warehouse employees, and thus did not warrant requiring a different treatment from that accorded FSL containers that were stripped or stuffed by the consignee or shipper itself.[7]

Nor is the Board's conclusion that the Rules as applied to shortstopping and specialized warehousing practices have an unlawful "work acquisition" objective inconsistent with

---

[6]The court of appeals appears to have accepted these findings of the Board (Pet. App. 27a).

[7]Contrary to the Shipping Group (Resp. Br. 26), the Board *did* find that the work claimed by the Rules in respect to shortstopping and stripping and stuffing of FSL containers by specialty warehouses was not functionally related to traditional longshore work: the Board adopted the findings and conclusions of the ALJ (Pet. App. 42a, 57a), who found that shortstopping and specialty warehouse work was not historically and functionally related to traditional longshore work (*id.* at 134a-135a, 138a, 139a, 145a). The Board modified some of the ALJ's rationale, disclaiming any "reliance on the fact that the work now done by the truckers and warehouses is work which was not created by containerization" and relying instead on the fact that the break-bulk handling of the cargo contained in the FSL containers here at issue, previously performed by longshoremen, "essentially was eliminated" (*id.* at 59a). But the Board's holding that the Rules are unlawful as applied to shortstopping and specialty warehouse work is still grounded upon the ALJ's findings that the precontainerization longshore work functions had never included the functions served by shortstopping and specialty warehouse work.

its holding that the Rules as applied to consolidation of LCL containers have a lawful work preservation objective. A work preservation agreement, although valid in its intendment and valid in its application in particular contexts, may violate Sections 8(b)(4)(B) and 8(e) of the Act, 29 U.S.C. 158(b)(4)(B) and 158(e), when applied in other situations. See *NLRB* v. *Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 521 n.8 (1977).

2. The Shipping Group is on no firmer ground in asserting (Resp. Br. 18-21) that the Board could not conclude that the Rules as applied to shortstopping and certain warehousing practices had an unlawful "work acquisition" objective "in the absence of any factual finding that the Rules really do transfer warehousing or trucking work to the piers." For the reasons set forth in our opening brief (at 34-38), this assumption, which was the basis for the court of appeals' rejection of the Board's conclusion (Pet. App. 27a-28a), is erroneous. First, "work acquisition" is merely a shorthand phrase for describing the fact that the work sought to be preserved is not traditional work of the bargaining unit. If the work sought to be preserved is traditional work, the union's action is lawful irrespective of whether it would deprive other employees of work. This is the meaning of the Court's directive in *ILA I* that "the Board must focus on the work of bargaining unit employees, not on the work of other employees" (447 U.S. at 507). On the other hand, if the work sought to be preserved is not traditional work, the union's action is unlawful irrespective of whether it could be duplicated by the employees represented by the union and thus not deprive other employees of work. Second, this Court in *ILA I* specifically contemplated that the Board, in assessing the validity of the Rules, might take into account that "containerization has worked such fundamental changes in the industry that the work formerly done at the

pier by * * * longshoremen * * * has been completely eliminated." 447 U.S. at 510-511. The Court did not intimate that, if the Board found that the longshoremen's work had been eliminated, it must also find that the Rules deprived other employees of work. Third, it is likely that enforcement of the Rules with respect to FSL containers will, in fact, deprive the motor carrier and warehouse employees of work; for the more reasonable assumption is not that the longshoremen will do duplicative work but that the industry will develop practices that avoid an unnecessary break-bulk handling, which, in turn, would deprive motor carrier and warehouse employees of work. See Gov't Br. 36-38.

3. Finally, contrary to the Shipping Group's contention (Resp. Br. 22-24), the Board did not err in ruling that eliminated work cannot be preserved. The Board did not rest its finding that the Rules, as applied to shortstopping of FSL containers and the stripping and stuffing of such containers in connection with specialized warehousing practices, had an unlawful secondary objective solely on the fact that the traditional pierside work of the longshoremen had been eliminated as a result of containerization. It also relied on record evidence which revealed that the stripping and stuffing work claimed by the Rules in these respects was related to the traditional work patterns of motor carrier and warehouse employees, rather than to those of longshoremen.[8]

---

[8]Amicus AFL-CIO asks the Court to eliminate the work preservation-work acquisition dichotomy for determining whether an agreement violates Section 8(e) and instead to use as the touchstone " 'whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees' "; where that "touchstone is satisfied the agreement and its maintenance are primary," unless the contracting employer lacks the "right-of-control" over

For these reasons, as well as those set forth in our opening brief, the judgment of the court of appeals, insofar as it denied enforcement of the Board's order, should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board

APRIL 1985

---

the work in dispute (AFL-CIO Br. 8-9 (citation omitted)). This contention is simply inconsistent with the Court's prior decisions — in particular, with the Court's previous decision in this very controversy, in *ILA I*. In remanding in *ILA I*, the Court stated that, to be lawful under Section 8(e), an agreement "must [first] have as its objective the preservation of work traditionally performed by employees represented by the union." 447 U.S. at 504. In any event, the passage from *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612 (1967), which the AFL-CIO selectively quotes, shows that the inquiry whether the agreement seeks to preserve traditional work is indicative of whether it "is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees," or "tactically calculated to satisfy union objectives elsewhere" (*id.* at 644-645). Accord, *NLRB* v. *Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 517, 519-520 (1977).

DOJ-1985-04